90-534

IN THE

Supreme Court of the United States

MARY J. WALLER,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Fourth Circuit err in holding that federal subject-matter jurisdiction exists in this action by a plan administrator seeking to recover amounts paid to a plan participant who subsequently recovered from a third-party tortfeasor because the action "arises under" the federal common law of ERISA within the meaning of 28 U.S.C. Section 1331(a)?

II. Did the United States Court of Appeals for the Fourth Circuit err in holding that the "federal common law of ERISA" includes a cause of action for

unjust enrichment?

III. Did the United States Court of Appeals for the Fourth Circuit err in concluding that it need not address the question of whether Section 38.1-342.2 of the Code of Virginia, 1950, as amended, re-codified July 1, 1986, as Section 38.2-3405, is preempted by ERISA on the basis of its conclusion that the provision of the plan in question, which dealt with the right to require reimbursement from a plan participant who later recovers from a third-party tortfeasor, is not a "subrogation" provision and therefore would not fall within the ambit of the Virginia statute even absent preemption?

PARTIES TO THE PROCEEDING

The only parties to the proceeding in the court whose judgment is sought to be reviewed are those named in the caption of the case: Mary J. Waller and Provident Life and Accident Insurance Company.

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PRIOR OPINIONS IN THE CASE

Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985 (4th Cir. 1990)

Provident Life & Accident Ins. Co. v. Waller, Civ. Action No. 88-0173-R (W.D. Va., Roanoke Division, June 5, 1989) (Turk, C. J.) (unpublished Mem. Op.)

GROUNDS OF JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on June 27, 1990. Jurisdiction to conduct the requested review is conferred upon this Honorable Court by 28 U.S.C. Section 1254.

STATUTES INVOLVED IN THE CASE

28 U.S.C. Section 1331(a) (1988 ed.).

29 U.S.C. Section 1132(a)(1)(B) (1988 ed.).

Va. Code Ann. Section 38.1-342.2 (1950 & Repl. Vol. 1981).

Va. Code Ann. Section 28.3-3405 (1950 & Repl. Vol. 1986).

The full text of each statute cited above is contained in the Appendix to this Petition.

STATEMENT OF THE CASE

On February 21, 1986, Mary Waller was injured in an automobile collision in Virginia. As a result of this injury, she incurred medical expenses of $5,922.53.

At the time of her injury, Mrs. Waller was an employee of Burlington Industries participating in that company's qualified self-funded employee benefit plan, which was administered by Provident Life and Accident Insurance Company. This plan included the following provision:

> Medical and disability benefits are not payable to or for a person covered under the Group Plan when the injury or illness to the covered person occurs through the act or omission of another person. However, payment for medical care expenses...for an injury or illness in which a third party is liable may be advanced by Provident. For this to happen, the covered person must sign an agreement to repay the Group Plan in full any payments advanced...from the judgment or

settlement he or she received...."

Mrs. Waller submitted her medical bills to Provident, which paid them without requiring Mrs. Waller to sign a reimbursement agreement. When Mrs. Waller subsequently recovered from the third-party tortfeasor who caused her injury, Provident demanded reimbursement of all payments it had made to her. Mrs. Waller refused, contending the plan's reimbursement provision was invalid under Virginia law, specifically Va. Code Ann. Section 38.1-342.2, Virginia's "anti-subrogation statute," which was recodified as Va. Code Ann. Section 38.2-3405 on July 1, 1986.

Provident subsequently filed suit in the U. S. District Court for the Western District of Virginia, Roanoke Division, alleging that court had subject-matter jurisdiction over the suit pursuant to 29 U.S.C. Section 1132(a)(1)(B)(1982). Waller answered, denying that federal jurisdiction existed under ERISA and alleging by way of counter-claim that the recovery sought by Provident was prohibited by Section 38.1-342.2 of the Code of Virginia, 1950, as amended.

On June 5, 1989, the Honorable James C. Turk, Chief District Judge, handed down his opinion in the case. After holding that federal

subject-matter jurisdiction existed pursuant to 29 U.S.C. 1001-1461 (ERISA), Judge Turk went on to hold that Section 38.1-342.2, the Virginia Anti-Subrogation Statute, has been preempted by ERISA. Nevertheless, because Provident had failed to have Mrs. Waller sign a reimbursement agreement prior to making payments, as required by the plan, Judge Turk held that Provident could not recover.

Provident subsequently appealed Judge Turk's decision to the United States Court of Appeals for the Fourth Circuit. On June 27, 1990, that Court, speaking through Judge Murnaghan, held that the District Court had erred in concluding

federal jurisdiction over the case existed by reason of 29 U.S.C. Section 1132(a)(1)(B). The Fourth Circuit found, however, that federal subject-matter jurisdiction existed under 28 U.S.C. Section 1331(a), inasmuch as the cause of action in question arises under "the federal common law of ERISA." Having concluded federal jurisdiction existed, the Court went on to declare that the federal common law existing amid the interstices of ERISA includes a cause of action for unjust enrichment and that Provident was entitled to recover on this theory under federal common law. The Fourth Circuit never addressed the question whether the Virginia

statute Mrs. Waller contends invalidates the reimbursement provision in question has been preempted by ERISA, as the District Court had held, because it characterized the Virginia statute as prohibiting only "subrogation," which it defined narrowly as not including provisions requiring reimbursements by Plan participants.

ARGUMENT FOR ALLOWING WRIT

Petitioner respectfully submits that compelling reasons exist for granting certiorari with respect to each of the three questions presented by this case.

I. The Fourth Circuit erred in holding that federal subject-matter jurisdiction exists in this action

by a plan administrator seeking to recover amounts paid to a plan participant who subsequently recovered from a third-party tortfeasor because the action "arises under" the federal common law of ERISA within the meaning of 28 U.S.C. Section 1331(a).

The Fourth Circuit's opinion in this case held "that federal question jurisdiction exists pursuant to ERISA only where the issue in dispute is of 'central concern' to the federal statute," 906 F.2d at 990. Having acknowledged the limits to federal question jurisdiction in this context delineated by the decision of this Honorable Court in Franchise

Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 25-26 (1983), the Fourth Circuit then concludes that the issue presented in this case "meets [the] condition," 906 F.2d at 991, of being "of 'central concern'" to ERISA and, therefore, the case is a proper one for the exercise of federal jurisdiction under 28 U.S.C. Section 1331(a). Petitioner respectfully submits that the Court of Appeals erred in reaching this conclusion.

The Complaint filed to institute this case sought reimbursement from the defendant pursuant to a contractual provision of a group life, medical and

disability benefit policy issued by Provident to Burlington as part of an ERISA-qualified benefit plan. Although the plaintiff alleged federal jurisdiction under 29 U.S.C. Section 1132(a)(1)(B), a position the Fourth Circuit found untenable, in all other respects the action, as pled, was a simple collection case seeking to recover money on a contractual or quasi-contractual theory existing completely separate and apart from ERISA. This collection action was of no more "central concern" to ERISA than the state tax levy involved in Franchise Tax Board.

Petitioner respectfully submits that in finding it had "arising

under" jurisdiction in this case, the Fourth Circuit committed exactly the same analytical error as the Ninth Circuit in reaching the same conclusion in Franchise Tax Board: in each case the Circuit Court looked beyond the Complaint to the true issue presented, the question of preemption, and concluded, quite properly, that the extent to which State law is preempted by ERISA is a "central concern" to the federal statute.

Petitioner agrees that the issue of whether the Virginia anti-subrogation statute, Va. Code Ann. Section 38.1-342.2 (1950 & Repl. Vol. 1981) (now recodified as Va. Code Ann. Section 38.2-3405) has

been preempted by ERISA is of central concern. Under the circumstances of this case, however, the preemption question only enters the case by way of a defense to the collection action, that is, it first was raised when the defendant relied on the Virginia statute as barring the collection action, and the plaintiff countered that the Virginia statute had been preempted. Given this, the ruling of this Honorable Court in Franchise Tax Board adhering to the "well-pleaded Complaint" rule, 463 U.S. at 10, 13-14, 25-26, requires the conclusion here, as in Franchise Tax Board, that no Section 1331 "arising under" jurisdiction exists. Id. at 25-26.

II. The Fourth Circuit erred in holding that the federal common law of ERISA includes an implied cause of action for unjust enrichment in favor of a plan administrator.

As the Fourth Circuit noted in its opinion in this case, 906 F.2d at 992, the federal courts are divided on the propriety of finding that the federal common law of ERISA includes an implied cause of action for unjust enrichment or restitution of amounts paid by mistake. Thus, although the Sixth Circuit found such a cause of action to exist in favor of an employer which mistakenly had made certain payments into a plan, Whitworth Bros. Storage

Co. v. Central States Pension Fund, 794 F.2d 221, 235-36 (6th Cir.), cert. denied 479 U.S. 1007 (1986), the Seventh Circuit has found to the contrary, Cummings By Techmeier v. Briggs & Stratton, 797 F.2d 383, 390-91 (7th Cir. 1986), as has the Eleventh Circuit, Dime Coal Co., Inc. v. Combs, 796 F.2d 394, 396-99 (11th Cir. 1986). To further complicate matters, although leaving open the possibility that they might recognize such an implied cause of action in an appropriate case, both the Second and Third Circuits have cautioned against federal courts moving too quickly to create additional rights under the rubric of federal common law "where

Congress has established an extensive regulatory network and expressly announced its intention to occupy the field," Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1419 (2d Cir. 1985), quoting Van Orman v. American Ins. Co., 680 F.2d 301, 312 (3d Cir. 1982).

The division among the federal courts is even more sharply defined at the district court level. Thus, while the District Court for the District of Delaware has declared flatly that the federal common law of unjust enrichment existing amid the interstices of ERISA allows an employer to recover contributions made to a plan by mistake, Airco Industrial Gases v. Teamsters Health

& Welfare Pension Fund, 618 F. Supp. 943, 950 (D. Del. 1985), the District Court for the Southern District of New York has stated just as emphatically that there is no federal common law of unjust enrichment, Amato v. Western Union Int'l, Inc., 596 F. Supp. 963, 973 (S.D.N.Y. 1984), aff'd in part, rev'd in part on another ground, 773 F.2d 1402 (2d Cir. 1985), while the District Court for the Eastern District of Louisiana has gone so far as to declare developing a federal common law of unjust enrichment under ERISA would be inconsistent with ERISA's terms and policies, Morales v. Pan American

Life Ins. Co., 718 F. Supp. 1297, 1301-1302 (E. D. La. 1989).

Petitioner respectfully submits that the authority set forth above not only demonstrates the need for a ruling by this Honorable Court to resolve a conflict among lower federal courts, but also that the great weight of authority supports her position that no federal common law cause of action for unjust enrichment should be implied from ERISA. She respectfully submits that the Fourth Circuit erred in holding such an action exists, and in entering judgment against her on the basis of this holding.

III. The Fourth Circuit erred in concluding that it need not

address the question of whether Va. Code Ann. Section 38.1-342.2, re-codified as Va. Code Ann. Section 38.2-3405 on July 1, 1986, is preempted by ERISA.

Writing for the Fourth Circuit, Judge Murnaghan acknowledged the difficulty of the question raised by Mrs. Waller whether ERISA preempts the Virginia "anti-subrogation" statute. 906 F.2d at 989 n.7. Having acknowledged the difficulty of the question presented, and the split of authority on point, id., Judge Murnaghan then evaded the question of whether ERISA preempts Virginia's "anti-subrogation statute," Va. Code Ann. Section 38.1-342.2 (1950 & 1981 Repl. Vol.),

recodified as Va. Code Ann. Section 38.2-3405 effective July 1, 1986, by simply declaring that because the plan provision in question deals with reimbursement by the plan participant rather than subrogation in a narrow legal sense the statute is inapplicable. This conclusion is clearly wrong in light of the Supreme Court of Virginia's holding in Group Hospitalization Med. Service v. Smith, 236 Va. 228, 372 S.E.2d 159 (1988).

In Group Hospitalization, the Virginia court, to which the federal courts must defer on matters of interpretation of Virginia law, held the anti-subrogation statute, Va. Code Ann. Section 38.1-342.2,

applicable to a situation precisely like that presented by this case, i.e., where a plan sued a beneficiary to recover the amount it had paid the beneficiary after the beneficiary recovered from a third-party tortfeasor, 236 Va. at 230, 232, 372 S.E.2d at 160, 161. This decision conclusively demonstrates that the Virginia "anti-subrogation" statute is not limited to true subrogation, but also prohibits reimbursement provisions of exactly the type involved in this case. It necessarily follows that the question of whether ERISA preempts the Virginia statute cannot be avoided in the case, and the Fourth

Circuit erred in attempting to do so.

Once the inevitability of addressing the question of whether ERISA preempts state anti-subrogation statutes like Va. Code Ann. 38.1-342.2 is acknowledged, the split among the circuits, compare FMC Corp. v. Holliday, 885 F.2d 79, 89-90 (3d Cir. 1989), cert. granted, 110 S. Ct. 1109 (Feb. 20, 1990) (ERISA does not preempt Pennsylvania anti-subrogation provision because law did not address a "core type of ERISA matter"), with United Food & Commercial Workers & Employers Arizona Health & Welfare Trust v. Pacyga, 801 F.2d 1157, 1160, 1162 (9th Cir. 1986) (Arizona's anti-

subrogation law "relates to" benefit plan and so is preempted), arques strongly that a writ should be allowed in this case. That this Honorable Court has granted certiorari in FMC Corp. v. Holliday, a case presenting a very similar if not identical issue, underscores the importance of the issue presented, and the need for a definitive answer.

CONCLUSION

In light of the serious issues raised by the case, and the splits among the Circuits in their analysis and handling of these issues, Petitioner respectfully submits this is a proper case for allowing a Writ

of Certiorari, which action she respectfully requests.

MARY J. WALLER

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I. OPINION OF THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-2123

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,
Plaintiff - Appellant,

versus

MARY J. WALLER,
Defendant - Appellee.

No. 89-2124

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,
Plaintiff - Appellee,

versus

MARY J. WALLER,
Defendant - Appellant.

MURNAGHAN, Circuit Judge:

We are presented with several difficult questions regarding the scope of the Employee Retirement Income Security Act of 1974 ("ERISA") and the power of the federal courts to fill in the interstices of this comprehensive and labyrinthine statute. Specifically, we address whether the Provident Life & Accident Insurance Co. ("Provident") may recover monies advanced to one of its plan participants, Mary J. Waller, after she was injured in an auto accident. In response to Provident's action under ERISA for recovery of the advanced benefits, the district court concluded that Provident was

not entitled to reimbursement because it did not comply with one of the provisions of the ERISA-governed plan. On Provident's appeal, we conclude that a failure to repay this advance would unjustly enrich Waller and contradict the intent of both ERISA and the plan. Accordingly, we reverse the order of the district court and enter judgment for Provident.

I.

Waller was employed by Burlington Industries and a participant in its qualified self-funded employee benefit plan, which is administered by Provident. The plan pays life, medical and disability benefits to or on behalf

of its participants, such as Waller. However, the plan specifically provides in an "Acts of Third Parties" provision that

> Medical and disability benefits are not payable to or for a person covered under the Group Plan when the injury or illness to the covered person occurs through the act or omission of another person. However, payment for medical care expenses...for an injury or illness in which a third party is liable may be advanced by Provident. For this to happen, the covered person must sign an agreement to repay the Group Plan in full any payments advanced...from the judgment or settlement he or she receives....

(Emphasis added.)

On February 21, 1986, Waller was injured in a car accident in which she was not at fault. On

Waller's written request, Provident advanced her $5,922.53 in medical expenses despite never obtaining a signed repayment agreement.[1] Waller later recovered damages from the third party in excess of what the plan paid out to her. After Waller refused to reimburse the plan, Provident brought an action under ERISA, 29 U.S.C. Section 1132(a)(1)(B), (e)(2) (1982), for recovery of the advanced monies plus costs and attorney's fees. Although admitting to receiving the money

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[1] The record is silent on why the agreement was never signed by Waller. Provident states only that the benefits were advanced "at [Waller's] request." Appellant's Br. at 3.

from a third party,[2] Waller filed an answer questioning the district court's jurisdiction under Section 1132(a)(1)(B). She also filed a counterclaim under Section 1132(a)(1)(B) requesting a declaratory judgment that the Virginia anti-subrogation statute, Va. Code Ann. Section 38.2-3405, precluded reimbursement and was not preempted by ERISA. Finally, Waller requested class certification on behalf of all plan beneficiaries who had repaid money advanced by Provident.

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[2] An affidavit submitted by Burlington's group benefits manager demonstrated that Waller also knew of the "Acts of Third Parties" provision.

The district court denied Waller's motion to certify the class but denied Provident's motion for summary judgment and entered judgment in favor of Waller. The district court found that although ERISA preempted the Virginia anti-subrogation provision, Provident's failure to require Waller to sign the repayment provision constituted noncompliance with the terms of the plan and therefore barred its recovery of advanced expenses. Provident appeals that conclusion and Waller appeals the district court's denial of class certification.

II.

In its complaint, Provident alleged federal jurisdiction under ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B) (West 1985). Waller maintains that Section 1132(a)(1)(B) does not provide a federal cause of action for plan administrators. We agree, but nonetheless conclude that the district court had jurisdiction under the federal question provision.

A.

Section 1132(a)(1)(B) provides, in relevant part, that "[a] civil action may be brought...by a participant or beneficiary...to recover benefits due him under the

terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan" (emphasis added). Here, Provident was neither a participant nor beneficiary but rather the administrator of Burlington's self-funded plan.[3] Although we have not

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3 In the "definitions" section of ERISA, the term "participant" is described as "any employee...who is or may become eligible to receive a benefit of any type from an employee benefit plan...." 29 U.S.C.A. Section 1002(7) (West Supp. 1990). A beneficiary is described as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C.A. Section 1002(8) (West Supp. 1990). The term "administrator" means "the person specifically so designated by the terms of the instrument under which the plan is operated; [or]...the plan sponsor...." 29 U.S.C.A. Section 1002(16)(A) (West Supp. 1990).

yet addressed the scope of Section 1132(a), most of our sister circuits have limited federal jurisdiction to the suits by the entities specified in the statute. See, e.g., Herman Hosp. v. MEBA Medical & Benefits Plan, 845 F.2d 1286, 1288-89 (5th Cir. 1988) ("Where Congress has defined the parties who may bring a civil action founded on ERISA, we are loathe to ignore the legislature's specificity."); Pressroom Unions Printers League Income Security Fund v. Continental Assurance Co., 700 F.2d 889, 892 (2d Cir.) ("legislature [did not] intend[] to grant subject matter jurisdiction over suits by employers, funds, or other parties

not listed in Section 1132[a]...."), cert. denied, 464 U.S. 845 (1983).[4] Such a conclusion is amply supported by the Supreme Court's decision in Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 21 (1983), which noted that "[t]he express grant of federal jurisdiction in ERISA is limited to suits brought by certain

[4] The only circuit holding a contrary view is the Ninth, which held in Fentron Indus. v. National Shopmen Pension Fund, 674 F.2d 1300, 1304 (9th Cir. 1982), that certain "non-enumerated" parties have standing to sue under Section 1132(a)(1)(B). However, Fentron has been widely criticized and narrowed within its own circuit. See Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund, 700 F.2d 1269, 1278 (9th Cir.) (limiting Fentron to confer standing only where "specific and personal" injuries alleged), cert. denied, 464 U.S. 825 (1983).

parties...as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes." Finally, at least two courts specifically have concluded that plan administrators may not bring suit under Section 1132(a)(1)(B)[5] of ERISA. See Great Lakes Steel v. Deggendorf, 716 F.2d 1101, 1104 (6th Cir. 1983); In Re Sheppard, 658 F. Supp. 729, 734 (C.D. Ill. 1987). We find ourselves in agreement with this view, and so conclude that Provident cannot bring suit under Section 1132(a)(1)(B).

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[5] It is probable, however, that Provident could have sued under Section 1132(a)(3), which provides that

> "[a] civil action may be brought...by a

B.

Ordinarily, the failure to state the federal statutory or constitutional provision under which

> participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C.A. Section 1132(a)(3) (West 1985) (emphasis added). Recently, we concluded in an analogous ERISA situation that a plan administrator "is clearly a fiduciary." U. S. Steel Mining Co. v. District 17, United Mine Workers of America, 897 F.2d 149, 152 (4th Cir. 1990). That conclusion is bolstered by a recent Department of Labor regulation, which states that "a plan administrator...must, by the very nature of his position, have 'discretionary authority [and fiduciary status]." 29 C.F.R. Section 2509.75-8 (1989).

a claim arises warrants dismissal for lack of subject matter jurisdiction. However, it is well settled that courts may excuse pleading defects if the facts alleged in the complaint and the relief requested demonstrate the existence of a substantial federal question. See Schlesinger v. Councilman, 420 U.S. 738, 744 n.9 (1975) (Section 1331 "nowhere mentioned" in complaint but facts "demonstrate the existence of a federal question"); Blue v. Craig, 505 F.2d 830, 844 (4th Cir. 1974) ("[I]f facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be

specifically pleaded.") (quoting Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969)); 5C. Wright & A. Miller, Federal Practice & Procedure: Civil Section 1209, at 92 (1969 & Supp. 1989) ("failure to name the particular statute...under which the action arises is not fatal if the remainder of the complaint shows that a federal question actually is involved or relied upon by the pleader"). We believe that the balance of Provident's complaint demonstrates that a federal question is involved, see 28 U.S.C. Section 1331(a) (1982).[6]

6 Although the ERISA provision not referred to in Provident's complaint, 29 U.S.C. Section 1132(a)(3), may also provide a route to federal jurisdiction, there is seemingly little or no authority

Section 1331(a) provides that district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." A suit "arises under" federal law if federal law creates the cause of action. American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916); Cook v. Georgetown Steel Corp., 770 F.2d 1272, 1274 n.2 (4th Cir. 1985). Although the issue was at one point in doubt, see T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827-828 (2d Cir. 1964) (Friendly, J.), cert. denied, 381 U.S. 915 (1965), there is no longer any

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with regard to that question. Accordingly, in this case, we prefer to ground federal jurisdiction under the federal question provision.

question that the word "laws" in Section 1331(a) embraces claims founded upon federal common law. In Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972), the Supreme Court concluded that "Section 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin." City of Milwaukee involved a public nuisance suit brought by the State of Illinois against four Wisconsin cities and a city sewage commission for dumping raw sewage into Lake Michigan. The Court, asked to exercise its original jurisdiction because a state was a party, declined but instead found federal question jurisdiction. The

Court held that because Congress had federalized the area of water pollution with the Water Pollution Control Act of 1972, federal courts could impose remedies that fell within the interstices of this act using a federal common law of nuisance. The Court concluded that such a suit arose under the "laws" of the United States. 406 U.S. at 100-04.

Citing City of Milwaukee, several courts have held that ERISA actions governed by federal common law "arise under" federal law for purposes of Section 1331. See Airco Industrial Gases v. Teamsters Health & Welfare Pension Fund, 850 F.2d 1028, 1033 (3d Cir. 1988); Whitworth

Bros. Storage Co. v. Central States Pension Fund, 794 F.2d 221, 236 (6th Cir.), cert. denied, 479 U.S. 1007 (1986); Northeast Dep't ILGWU v. Teamsters Local Union No. 229, 764 F.2d 147, 154-159 (3d Cir. 1985) (opinion of Becker, J.). Cf. Award Service, Inc. v. Northern Calif. Retail Clerks Unions, 763 F.2d 1066, 1068 (9th Cir. 1985) (district court had Section 1331 jurisdiction for purposes of determining whether employer had implied cause of action under ERISA), cert. denied, 474 U.S. 1081 (1986). One commentator has cited City of Milwaukee for the proposition that "federal common law supports federal question jurisdiction in the district courts

in exactly the same way as other federal law does." Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 897 (1986); see also Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 40-46 (1985).

As to the situation presented sub judice, both Airco Industrial Gases and Whitworth are particularly instructive. In Airco, an employer sued an employee benefit plan seeking to recover, under the equitable doctrine of unjust enrichment, overpayments made by mistake. After the district court found federal question jurisdiction and granted relief for the plaintiff, the Third Circuit

affirmed on the jurisdictional point. Writing for a unanimous panel, Judge Higginbotham stated that ERISA's broad preemption provision, 29 U.S.C. Section 1144(a), "require[s] the application of federal legal principles for its disposition in this case, that is, federal common law principles." 850 F.2d at 1033. Thus, the court concluded that "we agree with [the district court's] conclusion that section 1331 conferred upon it subject matter jurisdiction to determine the existence of a federal common law cause of action based on unjust enrichment." Id. at 1034 (emphasis added).

Similarly, in Whitworth, an employer sued under the contract doctrine of restitution to recover payments mistakenly made to a retirement plan. Because the employer was neither a plan participant, beneficiary, or fiduciary, the Sixth Circuit concluded that the plaintiff could not premise jurisdiction on the face of the ERISA statute. 794 F.2d at 227. However, because the restitution claim could only be decided under federal common law given ERISA's preemption clause, the court held that plaintiff's claims "arise under federal law pursuant to 28 U.S.C. Section 1331." Id. at 233.

As in Airco and Whitworth, this appeal presents an application of federal common law. There is little question that Provident's claim of unjust enrichment may not be predicated on state law given ERISA's broad preemption provision.[7]

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[7] A question does exist, however, as to whether ERISA preempts the Virginia anti-subrogation provision, Va. Code Ann. Section 38.2-3405 (Michie 1986 Repl.). Provident argues, and the district court agreed, that preemption is appropriate; conversely, Waller contends that the Virginia provision is controlling and requires a judgment in her favor. Despite the district court's finding that the anti-subrogation statute "without reservation" meets the test for preemption outlined in Shaw v. Delta Air Lines, 463 U.S. 85, 97-99 (1983), we note that the issue of whether state anti-subrogation provisions are preempted by ERISA has divided the courts. Compare FMC Corp. v. Holliday, 885 F.2d 79, 89-90 (3d Cir. 1989) (ERISA did not preempt Pennsylvania anti-subrogation

See 29 U.S.C.A. 1144(a) (West 1985)

provision because law did not address a "core type of ERISA matter"), cert. granted, 58 U.S.L.W. 3513 (U.S. Feb. 20, 1990) (No. 89-1048), with United Food & Commercial Workers & Employers Arizona Health & Welfare Trust v. Pacyga, 801 F.2d 1157, 1160 (9th Cir. 1986) (Arizona's anti-subrogation law "relates to" benefit plans and so is preempted).

We are saved from weighing in on the issue because we conclude that no subrogation situation is presented here. Typically, subrogation in the tortfeasor context involves the insurer stepping into the shoes of the insured and attempting to recover from the third party who caused the injury. See 16 Couch on Insurance 2d Section 61:172 (Rev. ed. 1983). The instant case, however, concerns a dispute over the terms of the insurance contract itself, and this contract does not provide for subrogation against a third party. All Provident seeks here is the money it paid out to the insured; it does not seek to step into Waller's shoes and proceed against the third party tortfeasor. Consequently, the Virginia anti-subrogation provision is inapplicable, and so we do not reach the preemption issue.

("the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...."). The Supreme Court has interpreted this provision to preempt state common law contract and tort claims because they "relate to" an employee benefit plan, see Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 62 (1987), and we cannot see how a different result could ensue from a claim for unjust

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In light of that consideration, if preemption through ERISA had not occurred and we were thrown back on the Virginia law, the situation, as later explanation in the opinionn indicates, is one calling for application under Virginia law of unjust enrichment principles.

enrichment. See Airco Industrial Gases v. Teamsters Health & Welfare Pension Fund, 618 F. Supp. 943, 950 n.6 (D. Del. 1985) ("existence of a federal common law action for unjust enrichment action preempts plaintiff's claimed state law action"). Having established ERISA's applicability, we must then focus on common law remedies because ERISA does not provide an explicit remedy for Provident. Although it has been well recognized for years, both the Supreme Court and this circuit recently gave express authorization for federal courts to "develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" Firestone Tire &

Rubber Co. v. Bruch, _____ U.S. _____, 109 S. Ct. 948, 954 (1989) (quoting Pilot Life, 481 U.S. at 56); see also U.S. Steel Mining Co. v. District 17, United Mine Workers of America, 897 F.2d 149, 152 (4th Cir. 1990) ("the drafters of ERISA authorized courts to develop federal common law"). Here, we must undertake precisely the task outlined in Firestone and already performed in a different context in Steel Mining, i.e., develop and add to the growing federal common law of ERISA rights and obligations.

Our holding today that the creation of ERISA federal common law establishes "arising under" jurisdiction is not without

boundaries, however. The mere invocation by a plaintiff of Section 1331 and federal common law is not enough, by itself, to confer federal question jurisdiction. For example, a more specific statutory provision conferring exclusive jurisdiction elsewhere would supersede the application of Section 1331. E.g., Connors v. Amax Coal Co., 858 F.2d 1226, 1230 (7th Cir. 1988) (Longshore and Harbor Workers' Compensation Act supplants application of Section 1331 and ERISA in disputes concerning specific medical expenses). Rather, we hold, as did the Third Circuit in Airco, 850 F.2d at 1033, that federal question jurisdiction exists

pursuant to ERISA only where the issue in dispute is of "central concern" to the federal statute. Such a conclusion is supported both by Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), and Shaw v. Delta Air Lines, 463 U.S. 85 (1983), two cases decided the same day that address the existence of federal jurisdiction over claims that relate to ERISA.

In Franchise Tax Board, a state taxing authority brought suit against an ERISA-qualified benefit trust fund seeking damages and a declaration that its authority to levy was not preempted by ERISA. Despite the fact that the state did

not fall within the parties allowed to sue under Section 1132(a), the state argued that any action that required an interpretation or application of ERISA "arose under" the laws of the United States and created Section 1331 jurisdiction. Writing for a unanimous Court, Justice Brennan did not agree, and held that despite the statute's broad scope, the Congress did not intend for ERISA to preempt every cause of action relating to benefit plans. Thus, the Court concluded, "a suit by state tax authorities...does not 'arise under' ERISA...[because] the State's right to enforce its tax levies is not of central concern to the

federal statute." 463 U.S. at 25-26.

Despite the Court's refusal to invoke federal question jurisdiction in Franchise Tax Board, its decision should not be read as a rejection of the application of Section 1331 to other claims governed by ERISA, especially those that require application of federal common law.[8]

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8 In Northeast Department ILGWU v. Teamsters Local Union No. 229, 764 F.2d 147, 165-167 (3d Cir. 1985), all three panel members reached different conclusions regarding the effect of Franchise Tax Board and the jurisdictional basis of a claim brought by one employee benefit plan against another. Judges Becker and Sloviter agreed that Section 1331 provided the basis for jurisdiction over a question implicating ERISA, but District Judge Fullam, sitting by designation, held that the express jurisdictional grant of Section 1132(a)(1)(B) provided the appropriate basis. However, Judges

The situation presented in Franchise Becker and Sloviter disagreed as to the reasons for Section 1331 jurisdiction. Interpreting City of Milwaukee, Franchise Tax Board and Delta Air Lines, Judge Becker held, as we do here, that a claim requiring the application of federal common law arises under the laws of the United States. Disagreeing, Judge Sloviter argued that Franchise Tax Board "expressly rejected" the view that "arising under" jurisdiction may be created when federal common law supplies the rule of decision. 764 F.2d at 165-66 (Sloviter, J., concurring). Rather, Judge Sloviter found that Section 1331 jurisdiction was proper because, like the plaintiffs in Delta Air Lines, the Northeast Department plaintiffs brought suit to clarify their obligations under an ERISA-governed plan. Id.

This disagreement was clarified partially by the Third Circuit in Airco. There, Judge Higginbotham "agree[d]" with Judge Becker's view that Franchise Tax Board did not foreclose Section 1331 jurisdiction over claims that could arise under the federal common law of ERISA, so long as the claims were of "central concern" to ERISA. 850 F.2d at 1033-34 n.5. We find that view of Franchise Tax Board persuasive and so adopt it today.

Tax Board was unusual (as it involved the state taxing power and an entity not subject to ERISA regulation), and so the Court was not faced with and did not decide whether federal question jurisdiction could be predicated on the basis of federal common law in accordance with City of Milwaukee. In contrast, Delta Air Lines represented a more typical ERISA action as there several companies subject to ERISA regulation brought declaratory judgment actions alleging that ERISA preempted several state benefit laws. Noting the difference from Franchise Tax Board, which the Court said "d[id] not call into question the lower

courts' jurisdiction to decide these cases," the Court held that the plaintiffs "present[ed] a federal question over which the federal courts have jurisdiction under 28 U.S.C. Section 1331 to resolve." 463 U.S. at 96 n.14. See also Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64-67 (1987) (claim of ERISA preemption that is also within scope of Section 1132(a) arises under laws of United States for purposes of Section 1331).

We read Franchise Tax Board and Delta Air Lines to provide, "at a minimum," Airco, 850 F.2d at 1033 n.5, for federal question jurisdiction under ERISA where the issue presented, whether it be the

creation of federal common law or the interpretation of a specific ERISA provision, is of "central concern" to the statute. We believe the instant case meets this condition. As will be shown below, the issue of whether federal courts should impart unjust enrichment principles into the gaps left by ERISA is one that has divided the courts. Similarly, the issue of whether employers and plan administrators should receive the benefit of these common law principles requires an examination of several collateral ERISA provisions as well as the concerns behind the formulation of the statute. Consequently, we conclude

that "the absence of an express statutory grant of jurisdiction in Section 1132 of ERISA is, under the rationale of [City of Milwaukee], irrelevant, and this claim may be adjudicated in federal court pursuant to 28 U.S.C. Section 1331(a)." Northeast Department, 764 F.2d at 155.

III.

Having established that federal question jurisdiction exists and that the dispute is governed by the federal common law of ERISA, we must now consider whether such common law should include the unjust enrichment remedy sought by Provident. Like many issues that involve ERISA, the federal courts are divided over the

creation of a federal common law of unjust enrichment. Compare Cummings By Techmeier v. Briggs & Stratton, 797 F.2d 383, 390 (7th Cir. 1986) (courts should only invoke federal common law of unjust enrichment in "limited circumstances"), and Van Orman v. American Ins. Co., 680 F.2d 301, 312 (3d Cir. 1982) (no federal common law cause of action under doctrine of unjust enrichment when "such a right would override a contractual provision"), and Amato v. Western Union Int'l, 773 F.2d 1402 (2d Cir. 1985) (no ERISA common law of unjust enrichment in "circumstances of this case"), with Airco Industrial Gases v. Teamsters Health & Welfare Pension Fund, 618

F. Supp. 943, 950 (D. Del. 1985) (included within grant of authority to create federal common law "is the power, in appropriate circumstances, to order restitution to prevent unjust enrichment"), with Morales v. Pan American Life Ins. Co., 718 F. Supp. 1297, 1301 (E.D. La. 1989) ("[c]reation of a federal common law of unjust enrichment...would be inconsistent with ERISA's terms and policies."). Cf. Whitworth, 794 F.2d at 235-36 (finding federal common law cause of action by employer to recover mistakenly paid pension contributions); Dime Coal Co. v. Combs, 796 F.2d 394, 397-99 (11th Cir. 1986) (reaching contrary conclusion to Whitworth).

A.

When entering the fray, we must keep in mind two points. The first involves general concerns about ERISA and federal common law. Despite the power of the federal courts to fill in the interstices of ERISA, we must respect the fact that Congress in creating ERISA has "established an extensive regulatory network and has expressly announced its intention to occupy the field." Van Orman, 680 F.2d at 312. Accordingly, we must proceed cautiously in creating additional rights under the rubric of federal common law, and remember that we do not possess carte blanche authority to "use State common law to re-write

a federal statute." Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986).

It was such concerns that prompted Judge Butzner to announce recently that "we are constrained to fashion only those remedies that are appropriate and necessary to effectuate the purposes of ERISA." U.S. Steel Mining Co. v. District 17, United Mine Workers of America, 897 F.2d 149, 153 (4th Cir. 1990). In Steel Mining, an employer and a pension fund, relying on Section 1132(a) of ERISA, sought to recover extracontractual restitution and attorney's fees from a union. The employer and fund had paid these costs pursuant to a West Virginia

statute that was subsequently declared to be preempted by ERISA. Declining to engraft a remedy for extracontractual restitution under the guise of federal common law, the court noted that "Congress did not intend that federal courts should develop common law to decide...issues that bear at best a most attenuated relation to the purposes of ERISA." 897 F.2d at 153.

In addition, we also recognize the concerns that have prompted several courts to decline to impose a federal common law of unjust enrichment. In Cummings By Techmeier v. Briggs & Stratton, 797 F.2d 383, 390 (7th Cir. 1986), the

Seventh Circuit held that fashioning a federal common law unjust enrichment doctrine, although permissible in other circumstances, was inappropriate when it would override a contractual provision in a pension plan. Since the "enrichment" in Cummings by Techmeier was authorized by the express terms of the plan, the court concluded that it would not vindicate any "important statutory policy" to supplement the defined remedies in ERISA. 797 F.2d at 390-91. Similarly, in Van Orman v. American Ins. Company, 680 F.2d 301, 312 (3d Cir. 1982), the Third Circuit held that plan participants were not entitled, under the

doctrine of unjust enrichment, to portions of an actuarial plan surplus. Writing for the court, Chief Judge Seitz stated that because the plan document did not afford the plaintiffs any right to the surplus, contravening the provision would "require[] a particularly strong affirmative indication that such a [common law] right would effectuate a statutory policy." 680 F.2d at 313. Finally, we note the decision in Morales v. Pan American Life Ins. Co., 718 F. Supp. 1297, 1301 (E.D. La. 1989), which held that "[q]uasi-contractual remedies [such as unjust enrichment] have no place where

there is a contract between the parties." 718 F. Supp. at 1301.

B.

Recognizing these caveats, we nonetheless conclude that fashioning a federal common law rule of unjust enrichment is appropriate in the circumstances of this case. In developing this rule, we look to the plan contract itself, the statutory policies of ERISA, and state law. See Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275, 281 (7th Cir. 1990) (en banc). Unlike the plan documents in Cummings by Techmeier, which explicitly authorized the enrichment, and the one in Van Orman, which was silent as to the

plan surplus, the plan contract in the present case provided for repayment of the advanced monies. Thus, the creation of a common law remedy here would further the contract between the parties and effectuate the clear intent of Provident's "Acts of Third Parties" clause. Second, the remedy is in accord with the statutory provision in ERISA that allows for the return of mistakenly paid contributions made by employers to multiemployer plan funds. See ERISA Section 403(c)(2)(A), 29 U.S.C. Section 1103(c)(2)(A). Recently, several courts have cited to Section 1103(c)(2)(A) in creating a common law remedy for employers in their

suits to recover erroneous payments to pension funds. See, e.g., Plucinski v. I.A.M. Nat'l Pension Fund, 875 F.2d 1052, 1058 (3d Cir. 1989) ("if we did not recognize this cause of action it could lead to severely inequitable results that we do not believe were intended by Congress"). Although the payment made by Provident was probably not mistakenly advanced, Section 1103(c)(2)(A) indicates a desire to ensure that plan funds are administered equitably and that no one party, not even plan beneficiaries, should unjustly profit. Cf. Carl Colteryahn Dairy, Inc. v. West Pennsylvania Teamsters & Employers Pension Fund, 847 F.2d

113, 122 (3d Cir. 1988) (the rule that "a party should not be allowed to profit from its own wrongs" is "particularly apposite when dealing with [ERISA]" because Congress has emphasized the"equitable character" of these plans). As in the Plucinski case, reaching a contrary result would "discourage some employers from operating ERISA qualifying plans. It thus furthers the purposes of ERISA to recognize this cause of action." 875 F.2d at 1058.

Finally, the facts of the instant case fit the archetypal unjust enrichment scenario. As Provident repeatedly reminds us, the result in this case is an

inequitable one; the record indicates that Waller received a double recovery despite knowing about the plan's reimbursement provision, and despite the absence of a requirement that Provident's payment be made in the first place. Consequently, Provident argues, it is entitled to recover under a quasi-contractual theory. In Virginia, the "law will imply a promise to pay for goods received," Kern v. Freed Co., 224 Va. 678, 680, 299 S.E.2d 363, 365 (1983), and several cases recognize the related theory of quantum meruit, which holds that when one party performs services at the request of the other party to a contract, "the law

creates an obligation, which is an implied-at-law contract, to pay a reasonable compensation...." Humphreys Railways v. F/V Nils S, 603 F. Supp. 95, 98 (E.D. Va. 1984). As summarized by a national commentator, three elements encompass the equitable remedy of unjust enrichment and quasi-contract: the plaintiff must show that (1) he had a reasonable expectation of payment, (2) the defendant should reasonably have expected to pay, or (3) society's reasonable expectations of person and property would be defeated by nonpayment. C. Kaufman, Corbin on Contracts, Section 19A, at 50 (Supp. 1989).

In the instant case, all three elements are apparent. Provident reasonably expected to be reimbursed for its rather liberal advancements; Waller clearly was aware of the plan's "Acts of Third Parties" provision when she requested and then accepted the benefits; and the interests of society, as reflected by the goals of ERISA and efficient plan administration, would be served by allowance of an equitable remedy. Accordingly, we hold, in the circumstances of the case, that it is appropriate for a federal court to weave into the statutory fabric

of ERISA the federal common law remedy of unjust enrichment.[9]

REVERSED

[9] Given this disposition, we leave undisturbed the district court's finding on class certification.

II. FINAL JUDGMENT AND ORDER OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Plaintiff	)	Civil Action No. 88-0173-R
v.	)	FINAL JUDGMENT
MARY J. WALLER, Defendant	)	AND ORDER

In accordance with the memorandum opinion filed this day, it is hereby

ADJUDGED AND ORDERED

as follows:

(1) Defendant's motion to certify this case as a class action shall be and hereby is DENIED;

(2) Plaintiff's motion for a protective order shall be and hereby is GRANTED;

(3) Section 38.1-342.2 of the Virginia Code is preempted by federal law as it applies to the employee benefit plan at issue, and the terms of that plan are enforceable;

(4) Because Plaintiff failed to comply with the terms of the plan by failing to have Defendant sign a repayment agreement, Plaintiff's motion for summary judgment shall be and hereby is DENIED; and

(5) Judgment shall be entered in favor of the Defendant.

The Clerk of Court is directed to strike this case from the Court's active docket and to send certified copies of this order and the

accompanying memorandum opinion to counsel of record.

ENTER: This 5th day of June, 1989.

James C. Turk
Chief U. S. District Judge

III. MEMORANDUM OPINION OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Plaintiff	)	Civil Action No. 88-0173-R
v.	)	MEMORANDUM OPINION
MARY J. WALLER, Defendant	)	By: Honorable James C. Turk, Chief U. S. District Judge

This is an action to recover payments advanced by Provident Life and Accident Insurance Company ("Provident") to Mary J. Waller, defendant herein, under the qualified, self-funded employee benefit plan of Burlington Industries, Inc. ("Burlington"). Jurisdiction is alleged under the

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1001-1461, and the case is governed by federal law. The case is now before the Court on the defendant's motion to certify a class action and the plaintiff's motion for summary judgment. The Court has heard oral argument on these motions, and the matter is ripe for a decision.

The material facts in this case are not in dispute. Defendant is an employee of Burlington and is a participant in an employee benefits plan funded by Burlington and administered by Provident. The plan booklet provides that medical benefits are not payable under the

plan when the injury is caused by the act or omission of a third party. The plan goes on to provide, however, that payment of medical expenses in such cases may be advanced when the plan participant signs an agreement to repay any such advanced expenses when the participant has received payments from the responsible third party pursuant to any judgment or settlement. It is undisputed that defendant was involved in an accident which resulted in medical expenses in the amount of five thousand nine hundred twenty-two dollars and fifty-three cents ($5,922.53). It is also undisputed that Provident, on behalf of

Burlington, paid these medical expenses without having first obtained a repayment agreement from defendant. Notwithstanding the absence of any agreement to repay, Provident now seeks reimbursement, on behalf of Burlington, for the advanced medical expenses.

Defendant argues initially that Section 38.1-342.2 of the Code of Virginia prohibits any reimbursement agreements such as the one involved in this case. Burlington's plan is a self-funded, qualified plan under ERISA. 29 U.S.C. Section 1002(1). Consequently, the reimbursement provision, Section 38.1-342.2, and ERISA are all involved in this case, and the Court must determine whether

the Virginia antisubrogation provision is preempted by the broad language of 29 U.S.C. Section 1144(a).

The United States Supreme Court has established a two-part test to govern questions of preemption under Section 1144(a). Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). If the state law in question has a connection with the employee benefit plan and none of the narrow exceptions to Section 1144(a) apply, then the "conflicting and inconsistent State and local regulation" is displaced by ERISA. Id., at 97, 99. The Court finds without reservation that Section 38.1-342.2 meets both prongs of the

Shaw test and is preempted by federal law. The provision clearly relates to Burlington's benefit plan, see Davis v. Line Construction Benefit Fund, 589 F. Supp. 146 (W.D. Mo. 1984), and none of the limited exceptions apply.

The Court's inquiry, however, cannot end with its finding that the repayment provisions of the plan are applicable in this case. The terms of the repayment provision are equally binding on Burlington, Provident, and the plan participants. In this case, medical expenses were advanced to defendant without an agreement to repay those expenses from any settlement or judgment against the responsible

third party. Having failed to require defendant to sign such an agreement to repay, Provident and Burlington have not complied with the terms of the plan and cannot now recover the advanced expenses. Therefore, Provident's motion for summary judgment must be denied and judgment entered in favor of defendant.

The Court has also considered the defendant's motion for certification of a class action under Rule 23 of the Federal Rules

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At the hearing on the motions in this case, the parties advised the Court that medical expenses were also advanced under the plan to Ms. Waller's daughter, Nicole. In Nicole's case, however, an executed repayment agreement was obtained by Burlington and Provident and would be enforceable.

of Civil Procedure. While the Court has found that the repayment provisions of the plan are applicable and binding on Burlington and all plan participants, the Court also finds that Ms. Waller's defense in this action that she was not required to execute a repayment agreement is not necessarily similar to defenses available to other plan participants and that class certification would not be proper. The motion for certification should be denied.

Based upon the foregoing the Court holds that Virginia Code Section 38.1-342.2 is preempted by federal law, that the plan's repayment provisions are applicable

and binding, and that Burlington and Provident failed to comply with the terms of the repayment section in Ms. Waller's case and cannot recover the medical expenses advanced to defendant. The Court also holds that certification of this matter as a class action would not be proper. An appropriate order consistent with this memorandum opinion shall be entered this day.

DATED: This 5th day of June, 1989.

James C. Turk
Chief U. S. District Judge

IV. TEXT OF STATUTES INVOLVED IN CASE

A. 28 U.S.C. Section 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

B. 29 U.S.C. Section 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS Section 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to

enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS Section 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l).

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions. (1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1986 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USCS Sections 1051 et seq., Sections 1081 et seq.] (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USCS Section 1145].

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form. (1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 [29 USCS Section 1166(a) or (4)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known

address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4) [29 USCS Section 1021(b)(4)]. For purposes of this

paragraph, an annual report that has been rejected under section 104(a)(4) [29 USCS Section 1024(a)(4)] for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [29 USCS Section 1021(d)] with respect to any participant or beneficiary may in the court's discretion be liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity. (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the

administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State

courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy

or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions. (1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USCS Section 1145] in which a judgment in

favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1986 [26 USCS Section 6621)].

(h) Service upon Secretary of Labor and Secretary of the Treasury. A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering

benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 USCS Sections 1101 et seq.]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty. In the case of a transaction prohibited by section

406 [29 USCS Section 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [26 USCS Section 4975(f)(4)]) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [26 USCS

Section 4975(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 USCS Section 4975(e)(1)].

(j) Direction and control of litigation by Attorney General. In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject

to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor. Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(1) Civil penalties on violations by fiduciaries. (1) in the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 [29 USCS Sections 1101 et seq.] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other

person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal

Revenue Code of 1986 [26 USCS Section 4975].

C. Va. Code Ann. Section 38.1-342.2. Certain subrogation provisions and limitations upon recovery in hospitalization, medical, etc., policies forbidden.-- No contract of insurance providing hospitalization, medical, surgical and similar or related benefits, and no contract or plan for prepayment of future hospitalization, medical, surgical and similar and related benefits, delivered or issued for delivery in this State, shall contain any provision providing for subrogation of a person, corporation, or association paying

benefits under such policy, contract, or plan to the rights which the person receiving such benefits may have to recover from a third person for personal injuries for the treatment of which such services were rendered. Nor shall any such contract of insurance or contract or plan contain any provision denying or limiting the recovery by the person receiving benefits under such policy or contract or plan for services rendered for the treatment of personal injuries, for which services, payment or reimbursement has been or is to be received by or for the account of any such person, from any claim against or settlement

with a third person responsible for such personal injuries.

D. Va. Code Ann. Section 38.2-3405. Certain subrogation provisions and limitations upon recovery in hospital, medical, etc., policies forbidden. -- A. No insurance contract providing hospital, medical, surgical and similar or related benefits, and no subscription contract or health services plan delivered or issued for delivery in this Commonwealth shall contain any provision providing for subrogation of any person's right to recovery for personal injuries from a third person.

B. No insurance contract, subscription contract or plan shall contain any provision denying or limiting the recovery from any claim against or settlement with a third person responsible for such personal injures.